PRO SE HANDBOOK

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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CHAPTER I

INTRODUCTION

Welcome to the United States District Court for the Northern District of New York.

We have prepared this handbook specifically for the person who is representing himself/herself as a party to a lawsuit: the pro se litigant. This handbook is a practical and informative means of providing assistance to such individuals who are litigating claims in a federal forum. **It is important that you read this entire manual before you ask the Clerk's Office specific questions about your potential lawsuit; many of your questions will undoubtedly be answered in the chapters of this handbook.**

The early chapters of this handbook provide information that you should consider before filing your own lawsuit. If, after considering this information, you decide to file a case in federal court, additional information has been provided to assist you in filing your case and utilizing the appropriate rules of procedure for the United States District Court for the Northern District of New York.

We have also provided you with an overview of the "ins and outs" of legal research, as well as a glossary of common and foreign words regularly used in the legal field. This handbook should not be considered the last word, nor should it be your only resource. Rather, this handbook should be considered simply as a procedural aid in helping you file and litigate your lawsuit.

If, after reading this manual, you still have questions about your case, you may contact the Clerk's Office. That office is willing to assist you with certain questions you may have regarding the Local Rules of Civil Procedure as well as the Federal Rules of Civil Procedure. Please do not hesitate to call on us regarding a procedural matter. However, **employees of the Court cannot give legal advice.**

For your convenience, the Clerk's office for the Northern District of New York has offices in the following locations:

Federal Building and
U.S. Courthouse
P.O. Box 7367
100 South Clinton Street
Syracuse, N.Y. 13261-7367
(315) 448-0507

James T. Foley
U.S. Courthouse
445 Broadway - Rm 222
Albany, N.Y. 12207-2924
(518) 431-0279

U.S. Courthouse and
Federal Building
15 Henry Street
Binghamton, N.Y. 13902
(607) 773-2893

Alexander Pirnie
Federal Building
10 Broad Street
Utica, N.Y. 13501
(315) 793-8151

Additionally, this manual, together with the Forms Index and glossary, is available on the Internet at the following address:

www.nynd.uscourts.gov

CHAPTER II

THE STRUCTURE OF THE COURTS

There are two court systems in the United States: the state court system and the federal court system. State courts typically hear civil, domestic (divorce and child custody),

probate and property disputes, as well as criminal matters, in accordance with the laws of each state. Matters typically heard by the federal courts involve complaints that allege violations of the United States Constitution, federal laws (including civil rights laws), admiralty and maritime matters, United States patent, trademark and copyright matters and bankruptcy proceedings. These matters usually fall into one of two main categories: A. federal question cases -- cases which "arise under" the Constitution, laws or treaties of the United States and B. diversity cases -- disputes arising between parties who are citizens of different states where the amount in controversy exceeds a certain amount set by Congress, currently $75,000.00.

As set forth in Chapter IV, before filing a case in a federal court, you should first try to ensure that the Court has **jurisdiction** over your potential lawsuit. Jurisdiction is the authority given to a Court to hear and decide certain cases.

The following is a list of the federal courts. These courts are given their authority by the U.S. Constitution directly or by acts of Congress enacted under constitutional authority.

o **United States Supreme Court:**

- The United States Supreme Court is given its authority by Article III of the U.S. Constitution. The Supreme Court reviews certain judgments of the U.S. Courts of Appeals and, in certain instances, state court decisions of the highest state court which involve a substantial federal question. The Supreme Court has original jurisdiction over matters involving treason and presidential impeachment.

- **<u>United States Courts of Appeals</u>:**

  - The Courts of Appeals for the District of Columbia and for the First through the Eleventh Circuits hear appeals from the federal district courts, bankruptcy courts and tax courts. They also directly review some decisions of various federal administrative agencies.

  - The United States Court of Appeals for the Federal Circuit hears appeals from final decisions of federal district courts for civil actions arising under any Act of Congress relating to patents, copyrights and trademarks, as well as final decisions of the district courts and the United States Claims Court where the United States is sued as a defendant. This Court also hears appeals from decisions of the United States Court of International Trade, the United States Patent and Trademark Office, the United States International Trade Commission relating to unfair import practices and decisions by the Secretary of Commerce relating to import tariffs, among others.

- **<u>United States District Courts</u>:**

  - The United States District Courts have jurisdiction over both criminal and civil actions. They also directly review decisions of certain federal administrative agencies.

  - There are four United States District Courts in New York: the Eastern, Southern, Western and Northern District Courts. Decisions from these Districts may be appealed to the United States Court of Appeals for the Second Circuit, which is located in New York City.

  - A list of the counties located within the Northern District of New York appears at the conclusion of this chapter. The acts alleged in your complaint should have occurred in one or more of these counties if you intend to file your lawsuit in the Northern District.

OTHER COURTS IN THE FEDERAL SYSTEM:

- United States Claims Court hears certain kinds of actions against the United States Government, except those involving tort claims under the Federal Tort Claims Act. These cases may be appealed to the United States Court of Appeals for the Federal Circuit.

- The Tax Court of the United States hears cases concerning the federal tax laws. Its decisions may be appealed to the appropriate United States Court of Appeals.

- United States Bankruptcy Courts hear all matters pertaining to bankruptcy and financial reorganization. Their decisions may be appealed to the United States District Court and, in some cases, to the appropriate United States Court of Appeals.

- The United States Court of Military Appeals hears appeals from court martial decisions.

- The United States Court of International Trade hears cases concerning the federal tariff laws. Its decisions may be appealed to the United States Court of Appeals for the Federal Circuit.

As we stated above, the federal district courts have both civil and criminal jurisdiction. They have original jurisdiction in a number of different actions, including:

- Civil actions arising under the Constitution, laws or treaties of the United States ("federal question" cases).

- Actions where the matter in controversy exceeds the sum or value of a certain amount set by Congress, currently $75,000, exclusive of interest and costs, and is between citizens of different states; citizens of a state and foreign states or citizens or subjects thereof or citizens of different states in which foreign states or citizens or subjects thereof are additional parties ("diversity" cases).

- All criminal offenses against the laws of the United States.

- Admiralty, maritime and "prize" cases.

- Bankruptcy matters and proceedings.

- All civil actions, suits, or proceedings commenced by the United States or by any agency or officer thereof.
- Actions involving injuries protected by specific federal laws (e.g., the Federal Employers Liability Act).

Finally, it is important to realize that just because you may properly file an action in **a** federal court, you generally should not file an action in the federal court for the Northern District of New York unless the actions (or inactions) that you believe violated your rights occurred within the boundaries of the Northern District. This is called "venue." (Refer to the Glossary for the definition of venue). For your reference, we have listed the counties that are located within the Northern District to assist you in determining whether you should file your lawsuit in this District or another District Court.

COUNTIES WITHIN THE NORTHERN DISTRICT OF NEW YORK

Albany	Essex	Madison	Saratoga
Broome	Franklin	Montgomery	Schenectady
Cayuga	Fulton	Oneida	Schoharie
Chenango	Greene	Onondaga	Tioga
Clinton	Hamilton	Oswego	Tompkins
Columbia	Herkimer	Otsego	Ulster
Cortland	Jefferson	Rensselaer	Warren
Delaware	Lewis	St. Lawrence	Washington

CHAPTER III

REPRESENTATION BY AN ATTORNEY

This handbook was developed to address the needs of the litigant who is filing a lawsuit without the aid of an attorney. However, there may be alternatives to representing yourself if you are indigent.

A. OBTAINING AN ATTORNEY PRO BONO.

In a **criminal** case, a defendant is **entitled** to legal counsel by the United States Constitution and one can be provided if indigence is shown on the part of the criminal defendant. However, in a **civil** case, a party is **not entitled** to an attorney. There are attorneys and organizations, such as legal aid societies, that may be willing to represent you "pro bono," that is, free of charge. You should contact these offices in an effort to secure representation on your own **before** you request that the Court appoint counsel on your behalf. As discussed more fully below, you must be able to prove to the Court that you could not obtain counsel on your own before the Court can consider appointing an attorney to represent you.

For **federal** inmates, a list of public interest firms that you should contact in an effort to secure representation on your own appears on page 5. For **state** inmates, there are several offices of Prisoners' Legal Services throughout the state. A list of the Prisoners' Legal Services is provided at the conclusion of this chapter on page 6.

B. APPOINTMENT OF COUNSEL BY THE COURT.

A pro se litigant that the Court has found to be indigent (typically by the granting of an in forma pauperis application) may request, by way of written motion, that the Court appoint counsel on such party's behalf if that person is unable to otherwise obtain counsel. You should be aware, however, that there are many more litigants seeking the appointment of counsel than there are attorneys willing to volunteer their services. Furthermore, there is no automatic entitlement to legal representation in a civil action, even though you may truly believe that you need an attorney in order to effectively present your case to the Court.

The Court considers requests for counsel in light of a number of factors set forth by the Second Circuit. First, the Court must determine whether the party's position is of substance. If so, the Court will then consider the following factors:

> The indigent's ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues and any special reason in that case why appointment of counsel would be more likely to lead to a just determination.

Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1341 (2d Cir. 1994) (quoting *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986)).

Any motion for the appointment of counsel must include a document detailing the party's efforts to obtain counsel by means other than court appointment. In making such a motion, you must include letters received from attorneys that you contacted regarding

your case. **Failure to include documentation which substantiates your attempts to obtain counsel on your own will result in the denial of your motion for appointment of counsel.**

You should also know that the judicial officers of the Northern District of New York may appoint an attorney from the District's pro bono panel in any number of different capacities. An attorney may be appointed for the limited purpose of preparing a confidential report analyzing the merits of the claim(s) raised by the plaintiff; as standby trial counsel to assist the pro se plaintiff at the trial of the lawsuit; as support counsel to assist another attorney; as trial counsel to conduct the trial of an action or as the party's attorney for both pre-trial matters as well as the actual trial of the lawsuit. The capacity in which an attorney is appointed for a party is entirely within the discretion of the Court.

A sample motion for appointment of counsel is located in the Forms Index of this handbook.

C. SANCTIONS AND HOW THEY APPLY TO THE PRO SE LITIGANT.

Pro se litigants are subject to the same sanctions as licensed attorneys. When a party to a lawsuit presents a document to the Court, that party is verifying the accuracy and reasonableness of that document. If such a submission is false, improper or frivolous, the party may be liable for monetary or other sanctions.

Fed.R.Civ.P. 11 provides in pertinent part, as follows:

> (b) Representations to Court. By presenting to the court ... a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
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> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may ... impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
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> (2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.... [T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or ... an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Thus, pursuant to Fed.R.Civ.P. 11, sanctions imposed by a Court could consist of, among other things, a monetary penalty or an award of the prevailing party's attorney fees, which could be a substantial sum. The Court may also prevent or "enjoin" a party from filing any future lawsuits until such time as the sanctions imposed have been paid. Sanctions can also be imposed on individuals who are incarcerated. *See Young v. Corbin*, No. 87-CV-433, slip op. at 8 (N.D.N.Y. June 23, 1995) (McAvoy, C.J.) (upholding sanctions against inmate who filed pro se lawsuit).

D. PUBLIC INTEREST FIRMS TO CONTACT IN ORDER TO OBTAIN PRO BONO COUNSEL

(1) Federal inmates should contact the following public interest firms regarding possible pro bono representation:

(a) Community Law Offices
230 East 106th Street
New York, NY 10029

(b) Prison Task Force
National Lawyers Guild -- Buffalo Chapter
O'Brien Hall
SUNY Buffalo Law School
Amherst, NY 14260

(c) American Civil Liberties Union
132 West 43rd Street
New York, NY 10036

(2) **State** inmates should contact the following offices regarding possible pro bono representation:

OFFICES OF PRISONERS' LEGAL SERVICES
FOR THE STATE OF NEW YORK

(1) 301 South Allen Street
Albany, NY 12208
(518) 438-8046
Great Meadow & Coxsackie Correctional Facilities

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(2) 210 Franklin Street, Suite 500
Buffalo, NY 14202
(716) 854-5161
Attica Correctional Facility

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(3) 205 South Street, #200
Poughkeepsie, NY 12601
(914) 473-3810
Green Haven Correctional Facility

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(4) 118 Prospect Street, Suite 307
Ithaca, NY 14850
(607) 273-2283
Auburn & Elmira Correctional Facilities

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(5) 22 Broad Street
P.O. Box 1215
Plattsburgh, NY 12901
(518) 563-7300
Clinton Correctional Facility

You may also try to obtain representation from this office:

(6) 105 Chambers Street
2nd Floor
New York, NY 10007
(212) 513-7373

CHAPTER IV

THE SEVEN STEPS TO CONSIDER BEFORE FILING A LAWSUIT

There are seven important steps that we believe you should consider before you file a case in federal court. While useful, this list is not to be considered the final word, as you may need to consider other factors not specifically listed here. You must also understand that even if you have reviewed all seven of these steps, and you believe that you should prevail in your lawsuit, there is always a possibility that ultimately you may not prevail.

Inmates that seek permission to proceed in forma pauperis should take special care when considering these steps, because even if your case is dismissed, you are, by law, required to pay, over time, the entire filing fee relating to your lawsuit, which for civil rights actions is currently $250.00.

THE SEVEN STEPS TO CONSIDER BEFORE FILING A LAWSUIT:

A. Real Injury or Wrong.
B. Jurisdiction.
C. Statute of Limitations.
D. People You Intend to Sue.
E. Immunity.
F. Facts and Evidence.
G. Necessity of Exhausting Available Remedies.

A. REAL INJURY OR WRONG.

Cases brought by persons without counsel typically fall into two categories: civil rights violations and tort claims.

A **civil rights** case involves a claim seeking redress for the violation of a person's civil or constitutional rights. This type of claim is often brought under the federal statute, 42 U.S.C. § 1983. This statute allows a person to sue individuals who, acting under color of state law, violate the constitutional rights of the plaintiff. Individuals that are suing federal defendants do not bring their lawsuit pursuant to this statute, however, because federal officials are not "state" actors. Instead, a claim against federal defendants is called a "*Bivens*" action, which derives it name from the case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Form complaints that can be used to bring claims under 42 U.S.C. § 1983 and pursuant to the *Bivens* case are in the Forms Index of this Handbook.

A **tort** is defined as a "private or civil wrong or injury." It is distinguished from criminal law because it is an injury against an individual as opposed to the state. If a person ran a stoplight and hit your car, the state would ticket the driver for running the stoplight but it would not be able to sue the driver for the damages you sustained in the accident. That is considered a private wrong or injury and it is the option of the victim to file a **civil** suit against the driver seeking damages for the injuries sustained. You cannot sue someone just because you are angry at them; you have to have been injured in some way.

B. JURISDICTION.

Jurisdiction is the authority of a Court to hear and decide certain cases. For a Court to render an enforceable judgment, it must have jurisdiction over both the "subject

matter" of the controversy and the persons or entities involved. The court system in general is described more fully in Chapter II of this handbook. For a federal court to have jurisdiction over the subject matter of a lawsuit, at least one of two important criteria must generally be established:

(1) The case must involve a "federal question" of law; or

(2) The parties to the case must be residents of different states (known as diversity of citizenship) and the monetary amount in controversy must exceed a certain amount set by Congress, currently $75,000.00.

Federal courts enforce "federal law," that is, the United States Constitution and federal statutes enacted by Congress; state courts enforce state laws. Sometimes the jurisdiction of courts overlaps, such as in diversity cases.

C. STATUTE OF LIMITATIONS.

A **statute of limitations** imposes a time limit within which a suit can properly be filed in Court. Some examples are as follows:

(1)	Civil rights claims brought under 42 U.S.C. § 1983:	3 years
(2)	Car accident or other personal injury:	3 years
(3)	Contract dispute:	6 years

Whether your claim is barred by the applicable statute of limitations is a legal question which may require legal research on your part. You should ascertain whether your action is barred by the applicable statute of limitations before filing a lawsuit.

D. PEOPLE YOU INTEND TO SUE.

When preparing a complaint, you must include facts (including dates) which support your claim that you are entitled to the relief you seek against **each** person or entity you are suing. You may not list six defendants in the caption of your complaint, but only discuss one or two of them in the main part, or "body," of your complaint. Rather, if you name people in the caption of your complaint, you must include in the body of this document specific allegations of wrongful conduct against each and every person that you have named. Moreover, you should list individuals by their name whenever possible, and avoid suing groups of people such as “the personnel department” or “the medical staff.”

Additionally, you must be able to ascertain the identity of any “John Doe” or “Jane Doe” defendants you have listed in your complaint. The U.S. Marshals Service cannot serve “Jane Doe” of the XYZ Corporation, nor can it serve “John Doe at the Southland Correctional Facility.” If the U.S. Marshals Service cannot serve a party, you will not be able to prevail in your lawsuit against such an individual. Of course, it is your responsibility, and not the duty of the Court, to ascertain the identities and addresses of those individuals whom you believe caused you to be injured.

E. IMMUNITY.

Immunity protects a person who is performing his/her duties as prescribed by law by affording such a person a defense to a lawsuit. For example, when a judge decides a case, he or she is immune from suit when performing the duties directed by law. However, if a judge has operated a car illegally and caused you to be harmed, you can sue the judge for the damages you sustained because driving a car does not fall under the duties of being a judge.

Most government employees are immune from suit if they are performing their assigned duties and are not aware that their conduct is in violation of the law.

You should realize that immunity may be a defense that prevents a person who is sued from being liable to you for damages. There may be other legal defenses that a person can assert which will also protect them from liability.

F. FACTS AND EVIDENCE.

You cannot sue someone just because you believe or you have a feeling that a person has violated your rights. You must have facts to support your claims. Relevant facts could include the time and place of the incident, witnesses who observed the behavior and actual articles of evidence (such as a memorandum, weapon, police report, medical records or other proof).

The burden of proof is on the plaintiff to win the case; without factual evidence, the case cannot be won.

G. NECESSITY OF EXHAUSTING AVAILABLE REMEDIES.

You should be aware that, in some instances, it is necessary for you to pursue certain remedies that may be available to you **before** you can properly pursue a claim in federal court. There are two areas in particular where this is likely to arise: (1) if you are appealing a federal agency's decision or (2) if you are seeking a writ of habeas corpus in federal court.

(1) Administrative Grievance Procedures.

People frequently want to appeal the decision of some governmental agency that affects them. An example of this is in the area of social security benefits.

If you want to appeal the denial of some benefit that is provided through an agency of the United States government or the state of New York, (for example, the denial of an application for social security benefits,) you must pursue **all** of the administrative procedures established by the agency for appealing its rulings **before** you file a lawsuit. **After** you have exhausted your administrative remedies, a sample form you may wish to use in order to appeal a decision of the Commissioner of Social Security is included in the Forms Index of this handbook.

(2) Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254.

A person who is incarcerated or is otherwise "in custody" pursuant to a judgment of conviction rendered in a state court order may wish to challenge the **fact** or **duration** of this confinement. Such a challenge would be brought as a petition for writ of habeas corpus against the person who holds the inmate in custody, i.e., the prison's warden. If the

person can successfully show that a constitutional right was violated which would have otherwise prevented the incarceration itself (the "fact of incarceration") or the duration of the incarceration, the Court will grant a writ of habeas corpus.

However, before a petition under 28 U.S.C. § 2254 can be properly filed in the federal court, the petitioner must pursue and **exhaust** all available state law remedies. This means that if you want to challenge a conviction or a sentence, you must pursue your rights of appeal under New York law. Only **after** you have fully pursued the available state law remedies will you be eligible to properly pursue a federal petition for a writ of habeas corpus. (This exhaustion requirement for habeas petitions does **not** apply to federal inmates filing habeas actions pursuant to 28 U.S.C. §§ 2241 or 2255).

You should also realize that there are time limits that now apply to petitions seeking a writ of habeas corpus. Section 101 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (Pub. L. No. 104-132, 110 Stat. 1212 (1996)) amended 28 U.S.C. § 2244 to require that habeas petitions brought under 28 U.S.C. § 2254 be filed no later than one year after the completion of state court direct review, with certain, limited, exceptions. The time during which a properly filed state court application for collateral review is pending is excluded from the one-year period. AEDPA, § 101 (codified at 28 U.S.C. § 2244(d)(2)). *See Reyes v. Keane*, 90 F.3d 676, 678 (2nd Cir. 1996). Therefore, if you are contemplating filing a habeas petition, you should be sure to file your action in a timely fashion.

In conclusion, it is important that you consider all of these steps before you file a

case. After all of these factors have been considered, you must still follow the procedures set out for the particular Court with which you will file your case. Many of the specific procedural rules for the Northern District of New York are set forth in the Local Rules. In Chapter V of this handbook, we will discuss the rules and procedures for filing lawsuits in the United States District Court for the Northern District of New York. If your case needs to be filed in any other court, you should contact the Clerk's office of that court for information regarding local rules and procedures for filing your case.

CHAPTER V

RULES AND PROCEDURES FOR FILING A CASE IN THE NORTHERN DISTRICT OF NEW YORK

A. FEDERAL AND LOCAL RULES OF CIVIL PROCEDURE.

If you are a party to a lawsuit, you are subject to the specific rules of procedure for the Court in which your case is filed. Federal courts are governed by the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") as well as other rules of procedure regarding specific areas such as evidence, appeals, etc.

In the United States District Court for the Northern District of New York, all procedures are governed not only by the Federal Rules of Civil Procedure but also by the Local Rules of Civil Procedure and the District's General Orders. The numbering system of the Northern District's Local Rules coincides with the numbering system of the Federal Rules for easy reference. Copies of the Federal and Local Rules of Civil Procedure can be found at County Court House libraries, law schools and at correctional institutions throughout the state.

You can obtain a personal copy of the Northern District's Local Rules, or of this handbook, if you come, in person, to any of the offices listed in Chapter I of this handbook.

The Clerk's office can only send you a copy of the Northern District's Local Rules if you send a self-addressed, postage paid envelope, with a postal value of $3.00, to the Clerk of Court.

You may obtain your own copy of this handbook by mail if you send a self-addressed,

postage paid envelope, with a postal value of $3.00, to the Clerk. Both of these publications can be sent to you if you send a self-addressed, postage paid envelope, with a postal value of $5.00, to the Clerk of Court. **Due to the cost of printing, you will be limited to one (1) copy of the above publications per calendar year. Even if your copy is lost through no fault of your own, you must wait until the next year to obtain another copy of these publications.**

The Clerk's Office cannot send out copies of the above materials unless a self-addressed envelope (with prepaid postage as noted above) is sent, in advance, to the Clerk. This rule applies to everyone, even if you are proceeding in forma pauperis.

It is important to remember that, as a pro se litigant, **you are responsible for becoming familiar with and following the Court's Local Rules and procedures.**

B. FILING FEES.

Most civil actions must be accompanied by the filing fee set forth in 28 U.S.C. § 1914(a), which is currently two hundred and fifty dollars ($250.00). Except as discussed below (relative to complaints filed by inmates), this fee must be paid in full at the time the complaint is presented to the Court for filing.

The procedure for filing a complaint differs depending upon whether the individual

commencing the action is an inmate.

(1) Procedure to be followed by non-inmates.

If you are not incarcerated at the time you commence your action, and you cannot afford to pay the full filing fee of $250.00, you must follow the following procedure:

(a) completely fill out an in forma pauperis application and sign it; and

(b) submit to the Court, at the time you file the action, an original complaint and a copy of your complaint for each of the defendants named in your lawsuit; and

(c) provide the Clerk with a completed civil cover sheet, summons and sufficient copies of completed USM-285 forms for service on each and every defendant named in your complaint.

(2) Procedure to be followed by inmates.

On April 26, 1996, 28 U.S.C. § 1915 was amended in such a manner so as to require inmates to pay, over time, the $250.00 statutory fee **even if the inmate is found to be indigent.** These amendments are part of the Prison Litigation Reform Act ("PLRA"). In order to implement the PLRA in the Northern District, the Judges of this District have enacted General Order No. 49 (as amended on January 11, 1997) ("General Order No. 49"). The full text of this General Order may be found at the end of this chapter.

If you are incarcerated at the time you commence your action, and you cannot afford to prepay the full filing fee of $250.00, you must follow the following procedure:

(a) completely fill out an in forma pauperis application, sign it and have it certified by an authorized officer at your current place of incarceration; and

(b) sign the authorization form issued by the Clerk's Office of the Northern District in light of the PLRA; and

(c) submit to the Court, at the time you file the action, an original complaint and a copy of your complaint for each of the defendants named in your lawsuit; and

(d) provide the Clerk with a completed civil cover sheet, summons and sufficient copies of completed USM- 285 forms for service on each and every defendant named in your complaint.

Notice to all litigants:

If you do not file an application to proceed in forma pauperis, or the Court denies your in forma pauperis application, you must pay the full statutory filing fee at the time your complaint is filed and effect service on the defendants in accordance with Fed.R.Civ.P. 4. You must also file proof of service of your complaint on the defendants with the Court.

C. COPIES OF DOCUMENTS.

Pro se litigants proceeding in forma pauperis are **not** exempt from the requirement of providing identical copies of documents that must be served on the parties that they name to their lawsuit. It is important to realize that, even though you believe you cannot afford to pay for copies of documents, neither the Court nor the Clerk's Office can make copies for you free of charge. Therefore, you should be aware that, even if you are proceeding with an action in forma pauperis, **copies of documents in the file of your action (including the complaint and any other documents submitted by you or other parties to the action,) cannot be provided to you by the Clerk's office without a charge of $0.50 per page, which must be paid in advance.**

You should always keep a copy of all documents that you send to the Court or the Clerk's Office for your own records. If you cannot afford to pay for copies, you must hand-write copies of these documents for service on the other parties to the action.

D. GUIDELINES ON FILING AND TIME CONSTRAINTS.

The following table may be used as a quick reference regarding items that must be completed/filed by a party, a brief description of the item, the Federal or Local Rule that relates to such item (if any) and when the item must be submitted to the Clerk.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Civil Cover Sheet	The document that must accompany the complaint and summons before filing can occur. Form A (sample only).	LR 3.1	Initial filing.
Complaint	Sets out the parties, the controversy and the governing law, allegations, statements of facts, and demand for relief. Does not include legal argument. Forms E1 and E2.	FRCP 3,8 & 10	Initial filing.
In forma pauperis application	Application made under penalty of perjury which seeks waiver of filing fee. **For non-inmates**, if granted, filing fee only (not other fees such as witness or copying fees) is waived. **For inmates**, if granted, filing fee need not be paid in full at one time, however it must be paid in accordance with 28 U.S.C. § 1915. Form F (two pages).		Initial filing.
Authorization Form (Inmates Only)	Authorizes agency having custody of the inmate to calculate, encumber and/or disburse funds from inmate account in order to pay filing fee. Form G (sample only).	General Order No. 49 (1/11/97)	Initial filing.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
USM-285 Form	Directs the U.S. Marshals Service to serve the defendant listed on USM-285 form with Summons and Complaint. You must fill out one USM-285 form for each defendant. Form D (sample only).		Initial filing.
Summons	Issued by the Clerk; it is served on the defendant with a copy of the complaint. Form B (sample only). A “Waiver of Service of Summons” can also be served on the defendant along with a copy of the complaint. Forms C1 and C2 (sample only). The summons informs the defendant that unless a response is filed concerning the complaint, a judgment may be entered in favor of the plaintiff.	FRCP 4 LR 5.1(f) *et seq.*	Issued with the seal of the Clerk after in forma pauperis application is granted.
Motions	Items which seek an order from the Court on some particular matter during the pendency of a case. Motions must comply with the Local Rules & Federal Rules of Civil Procedure. A party who files a motion is called a "movant." Form H contains a sample motion for appointment of counsel.	LR 7.1	At least 31 days before the "return date" of the motion. Must be filed before deadline for the filing of motions expires.
Response to motions	Adversary's response to motion filed by the other party.	LR 7.1(b)	At least 17 days before the "return date" of the motion.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Copies of Documents	When motions, stipulations or any other documents are sent to the Clerk or the Court, copies of any such documents must also be sent to all other parties to the action.	LR 5.1	When papers are sent to Court or the Clerk.
Discovery	All discovery requests, and the adversary's responses thereto, must be served upon other counsel and parties. Except in inmate-filed actions, discovery shall **NOT** be filed with the Court unless by order of the Court or for use in a motion filed by a party.	LR 26.2	Discovery must be completed within Court-imposed deadlines. Except in inmate-filed actions, discovery is not filed with the Court.
Proof of Service	Whenever a document is sent to the Court, there must be a "proof of service" document included, which states that a copy of that document was sent to the other party/parties (or their attorneys). Forms I1 and I2.	LR 5.1	Attached to the document sent to the Court or the Clerk.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

IN THE MATTER OF	:	
CIVIL ACTIONS BROUGHT	:	GENERAL ORDER # 49
PURSUANT TO	:	(SECOND AMENDMENT)
28 U.S.C. § 1915	:	

To implement the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (Apr. 26, 1996) ("PLRA"), and pursuant to the authority delegated by the active judges of this Court, it is hereby

ORDERED, that the following procedure be followed in civil actions where a prisoner seeks in forma pauperis status pursuant to 28 U.S.C. § 1915[1]:

1. A prisoner must submit the following along with the civil action:

   (a) A signed, fully completed and properly certified in forma pauperis application and

   (b) The authorization form issued by the Clerk's Office in light of the PLRA.

2. (a) (i) If the prisoner **has not** fully complied with the requirements set forth in paragraph 1 above, and the action is not subject to *sua sponte* dismissal, a judicial officer shall, by Court order, inform the prisoner as to what must be submitted in order to proceed with such action in this District ("Order").

   (ii) The Order shall afford the prisoner **thirty (30) days** in which to comply with the terms of same. If the prisoner has failed to fully comply with the terms of such Order within such period of time, the action shall be dismissed.

   (b) If the prisoner **has** fully complied with the requirements set forth in paragraph 1 above, and the action is not subject to *sua sponte*

[1] References to 28 U.S.C. § 1915 relate to this section as amended by the PLRA.

dismissal, the judicial officer shall review the in forma pauperis application. The granting of such application shall in no way relieve the prisoner of the obligation to pay the full amount of the filing fee. Moreover, the inmate shall be required to pay all other fees for which the prisoner is responsible in the future regarding such action, including, but not limited to, copying and/or witness fees.

3. After being notified of the filing of the civil action, the agency having custody of the inmate shall comply with the provisions of 28 U.S.C. § 1915(b) regarding the filing fee due concerning such action.

4. The terms of this General Order shall apply to all actions previously filed in this District that are subject to the PLRA. However, in no event shall the Clerk of Court refund to any inmate any partial payment received by the Clerk of Court toward the payment of the filing fee due in such action.

IT IS SO ORDERED.

Dated: January 11, 1997
Binghamton, New York

[Original order signed on this date]
Thomas J. McAvoy
Chief U.S. District Judge

CHAPTER VI

LEGAL RESEARCH -- AN OVERVIEW

It is not the purpose of this chapter to teach the pro se litigant all of the intricacies of legal research and writing, nor is it our goal to sort out the complexities of applying the law, whether it be statutory or case law, to the facts of a particular case. In fact, the law prohibits personnel employed by the Court, including its attorneys, from providing information regarding the application of the law to the facts of any case. Instead, we are providing information that is basic to a law library as a guideline for conducting your own research.

Just as there are certain standards of procedure for filing documents with the Clerk's office, there are certain standards for citing authority when applying the law to the facts of a certain case. The most common source people turn to in determining how to write correct citations is *A Uniform System of Citation*, (Sixteenth Edition), published and distributed by The Harvard Law Review Association, Cambridge, Massachusetts. It is more commonly referred to as "The Bluebook" and sometimes as the "The Harvard Citator." All of the information required for proper citation format can be found in this one text. This book is available in most law libraries.

Authority is the information used by a party to persuade a Court to find in favor of that party's side. Legal authority is divided into two classes -- primary and secondary.

A. PRIMARY AUTHORITY.

Primary authority is the most accepted form of authority cited and should be used before any other authority. There are two sources of primary authority: "statutory authority" and "case authority."

Statutory authority consists of Constitutions, codes, statutes and ordinances of either the United States, the individual states, counties or municipalities.

Case authority is comprised of court decisions, preferably from the same jurisdiction where the case is filed (in the Northern District, that includes the Second Circuit and District Court cases from the Northern District of New York). When a particular case is decided by a judge, it becomes "precedent," which means that it becomes an example or authority to be used at a later time for an identical or similar case, or where a similar question of law exists. Court decisions are the basis for the system of *stare decisis*. These decisions are published in what is called the National Reporter System which covers cases decided by the United States Supreme Court, the Courts of Appeals and the District Courts. **Digest systems** gather case decisions by subject matter on various points of law. There are many reporters in this system and they can be found in most law libraries. For example, there are digests that contain numerous cases dealing with the subject of civil rights which may be consulted by a person who has brought a civil rights action in federal court.

In conducting research, you should try to find cases that have already been decided

(precedent) which support the position you are taking in your case.

B. SECONDARY AUTHORITY.

Secondary authority is found in legal encyclopedias, legal texts, treatises and law review articles. It should not be cited except where no primary authority is located by the party conducting the research. Secondary authority can also be used to obtain a broad view of the area of law and also as a tool for finding primary authority.

There are various types of secondary authority, including the following:

(1) *Legal encyclopedias* contain detailed information about various topics.

(2) *Treatises* are texts written about a certain topic of law by an expert in the field.

(3) *Law review articles* are published by most accredited law schools and sometimes provide a broad overview of a particular subject matter.

(4) The *Index to Legal Periodicals* provides reviews of books in the law, as well as comments regarding cases listed in the "Table of Cases."

(5) *American Law Reports Annotated* (A.L.R.) is a collection of cases on more narrow issues of law. You should be aware that A.L.R. is constantly updated.

(6) *Restatements* are publications compiled from statutes and decisions which discuss the law of a particular field.

(7) *Shepard's Citations* is a large set of law books that provides a means by which any reported case (a cited decision) may be checked to see when and how another court (the citing decision) has referred to or interpreted the first decision. **All cases must be checked to make sure another court has**

not reversed or overruled your cited decision.

C. BASIC RULES FOR CONDUCTING LEGAL RESEARCH.

(1) Give priority to cases from your own jurisdiction (i.e., Second Circuit, Northern District of New York).

(2) Search for the most recent ruling on a subject matter.

(3) Check to see if your book has a pocket part; if so, use it to obtain current authority for your lawsuit.

(4) Be aware of "2d" and "3d" volumes. They distinguish one series from another. Cases that appear in "3d" volumes are more recent than those appearing in the "2d" series.

(5) All legal citations are written with the volume number first, an abbreviation of the Reporter's name, and the page number, *e.g.*, 924 F.2d 345; 752 N.Y.S. 2d 967 or 144 A.L.R. 422.

(6) Shepardizing your citations helps you avoid relying on overruled cases.

As stated earlier, the above information is not meant to be a complete or comprehensive guide to the law library or to legal research and writing, but is to be used merely as a guide to help you get started.

CHAPTER VII

SUBPOENAS

A. TYPES OF SUBPOENAS.

Subpoenas are notices issued by a Court, upon application by a party, commanding someone to do some act, such as appear at a specified time and place to give testimony regarding a certain matter. There are two basic types of subpoenas: **(1) a subpoena duces tecum**, which is a subpoena commanding a witness to bring relevant documents or things to be produced for inspection and/or copying and **(2) a subpoena ad testificandum**, which is a subpoena compelling a witness to appear at a judicial proceeding. Fed.R.Civ.P. 45 discusses subpoenas.

Subpoenas are also sometimes designated by the part of the case during which they are utilized. "Discovery subpoenas" are used during the discovery phase of the lawsuit, i.e., the period of time, after commencing the lawsuit and before trial, when the parties are gathering information and proof in accordance with Fed.R.Civ.P. 26 through 37. Similarly, "trial subpoenas" are used to obtain documents and witnesses for trial. You should not attempt to obtain a trial subpoena until after a judicial officer has informed you of a firm trial date for your lawsuit.

B. USE OF SUBPOENAS.

Subpoenas should not be used to obtain information from a **party** to a lawsuit. Rules 26 through 37 of the Fed.R.Civ.P. govern discovery of **parties** to an action and should be used to gain access to information and documents **without** the use of a

subpoena. Moreover, before resorting to the expense of a subpoena, you should first request the information sought from the non-party. By simply requesting the party's help first, you may avoid the effort and expense of obtaining a subpoena.

C. SERVICE AND EXPENSE OF SUBPOENAS.

You must ask the Clerk to issue a subpoena. A subpoena must be personally served on the person(s) asked to appear in person or to produce the requested documents. If a subpoena for the production of documents is issued, the custodian, i.e., the person in control of the requested documents, is usually **not** required to appear unless that person is subpoenaed as well. The party who issued the subpoena may be permitted to inspect and copy the documents produced at the time and place specified in the subpoena. However, you should be aware that **you will be required to pay any photocopying cost that was incurred by the party producing the requested documents**.

A person proceeding in forma pauperis can request that the U.S. Marshal serve a subpoena without being required to pay a fee for the actual service of the subpoena. However, a party requesting a subpoena **must** pay one day's witness fee (currently, forty ($40.00) dollars a day) and mileage (currently, 37 ½ cents per mile for each mile between the home of the party served (the "witness") and the site of the proceeding). This money must be provided to the U.S. Marshal in advance, who will in turn serve the subpoena on the person, together with these fees.

The fees discussed above cannot be waived even if you are proceeding with your lawsuit in forma pauperis.

A pro se litigant who is not proceeding in forma pauperis must pay the above-mentioned fees, as well as retain the services of a private process server, in order to properly serve a subpoena.

Finally, remember that a non-party cannot be required to travel more than 100 miles from their place of employment, business or residence in order to respond to a subpoena, even if it was properly served on them.

D. JURISDICTIONAL ISSUES.

You must determine the proper Court for obtaining a subpoena. A "discovery subpoena" must be requested from the district court of the district wherein the requested appearance of either the person or documents would occur. A "trial subpoena" must be requested from the Court that is conducting the trial.

E. OPPOSITION TO SUBPOENAS.

A motion to quash a subpoena is a motion made by the subpoenaed party to vacate or void the subpoena. For the restrictions on subpoenas and the reasons they may be quashed or modified, refer to Fed.R.Civ.P. 45(c)(3).

Pursuant to Fed.R.Civ.P. 45(c)(2)(B), a subpoena duces tecum is subject to **objections** as well as a motion to quash. Once served with a subpoena duces tecum, the custodian of the documents or things has fourteen (14) days to object to the information sought. If less than fourteen (14) days notice was given in the subpoena, these objections can be made at any time before the time specified for compliance in the subpoena.

Once a written objection has been made, there is no longer any obligation on the custodian to produce documents or things without an order to compel issued by the appropriate Court. The party seeking the subpoena must show a substantial need for the request, as well as an inability or hardship in getting the same information in another way.

Objections may be based on a number of reasons, including undue burden or hardship. Additionally, a party may object to a subpoena because of a legally recognized privilege, such as the attorney-client privilege. If the objection is based on privilege, the subpoenaed party must provide enough information in its objection to allow for the demanding party to contest the claim of privilege. *See* Fed.R.Civ.P. 45(d)(2).

CHAPTER VIII

MOTIONS

A motion is an application made to a judicial officer by a party that requests a ruling or order in favor of the party making the motion (the "movant"). Local Rule 7.1, included at the end of this chapter for your reference, sets forth the procedure for filing a motion in the Northern District; motions must be filed in conformity with Local Rule 7.1 or else they will be denied. Motions may be used to seek various types of relief during the pendency of an action, such as a motion to amend or a motion to compel discovery. However, motions should only be filed when necessary; multiple or frivolous motions can result in sanctions from the Court. *See* Chapter III Section C.

A. DOCUMENTS REQUIRED TO FILE A MOTION.

(1) Notice Of Motion.

The notice of motion is a concise document identifying (a) the type of motion; (b) the return date, i.e., the date on which the motion is to be heard by the Court; (c) the time the motion is to be heard and (d) the street address of the courthouse at which the motion is to be heard. In choosing a return date, remember that you must file your papers with the Court, and serve them on all parties, **at least thirty-one (31) days before the return date that you select**. *See* L.R. 7.1(b).

(2) Affidavit.

An affidavit is a sworn declaration of the facts and procedural background pertinent to the motion, set forth in concise, paragraph form. Affidavits submitted in conjunction with

a motion should contain **ONLY** the procedural history and the factual basis of the claim. Affidavits are not required, unless the Court otherwise directs, for motions filed pursuant to Fed.R.Civ.P. 12(b)(6), 12(c) or 12(f). *See* L.R. 7.1(c)(1)

(3) Memorandum of Law.

A memorandum of law is a document prepared by a party arguing a position on a legal matter regarding a case. It should contain a brief summary of the significant facts of the case, pertinent laws, including case law, and an argument as to how the law applies to the facts of the case. Your memorandum should also refer to specific sections of any affidavits or exhibits you have filed along with your motion. It may not exceed twenty-five (25) pages in length. (No memorandum is required, unless the Court otherwise directs, for motions made pursuant to Fed.R.Civ.P. 12(e), 15, 17, 25 or 37. *See* L.R. 7.1(c)(2)).

(4) Statement of Material Facts.

A statement of material facts is a separate, short and concise statement, in paragraph form, of the significant facts as to which the moving party contends there is no dispute. This statement must be filed with a motion for summary judgment brought pursuant to Fed.R.Civ.P. 56. *See* L.R. 7.1(f). In preparing such a statement, you should cite to your exhibits or other documents filed in the case whenever possible.

The party opposing a motion for summary judgment must include a separate, short and concise statement of the facts over which a dispute exists. **If the opposing party fails**

to contest any of the facts contained in the movant's statement of material facts, those facts are deemed admitted. *See* Local Rule 7.1(f). (Reminder: this statement is required **only** for motions made pursuant to Fed.R.Civ.P. 56).

B. TIME CONSIDERATIONS.

(1) Moving Papers.

Local Rule 7.1 addresses the time frame in which motion papers must be filed. As noted above, the moving party must file the requisite papers with the Clerk's office and serve them on the other parties at least thirty-one (31) days before the return date. (If the return date on the notice of motion is incorrect, the Clerk's office will set an appropriate date and notify the parties of same). Of course, parties must be sure to file all motions within the time limits previously established by the Court.

(2) Response Papers.

Parties responding to the motion must file their papers with the Clerk's office, and serve them on the other party, at least seventeen (17) days before the return date. (For response to cross-motions, see (4) below).

(3) Reply Papers.

Parties that wish to file papers in response to papers filed in opposition to a motion must obtain the permission of the Court to file "reply" papers, such permission will only be granted upon a showing of necessity. If Court permission is granted, reply papers must

be filed with the Clerk and served on the opposing parties not less than eleven (11) days before the return date of the motion.

(4) Cross-motions.

A cross-motion is a motion made by the "responding" party against the original movant. A cross-motion requests not only that the original motion be denied, but also that the Court rule in favor of the party filing the cross-motion (the "cross-movant") in some way. A cross-motion must be filed with the Clerk and served on all parties at least seventeen (17) days before the return date of the original motion. Any papers responding to the cross-motion must be filed with the Clerk and served on all parties at least eleven (11) days prior to the original motion date.

C. LOCAL RULE 7.1 MOTION PRACTICE. (Amended January 1, 2004)

Unless the Court directs otherwise, motions shall be made returnable at the **next regularly scheduled motion date at least thirty-one days from the date the motion is filed and served.** The moving party shall select a return date in accordance with the procedures set forth in subdivision (b). If the return date selected is not the next regularly scheduled motion date, or if no return date is selected, the Clerk will set the proper return date and notify the parties.

Information regarding motion dates and times is specified on the case assignment form provided to the parties at the commencement of the litigation or may be obtained from the Clerk's office or at the Court's webpage at "**www.nynd.uscourts.gov."**

(a) Papers Required.

Except as otherwise provided in this paragraph, all motions and opposition to motions require a memorandum of law, supporting affidavit, and proof of service on all the parties. See L.R. 5.1(a). Additional requirements for specific types of motions, including cross-motions, See L.R. 7.1(c), are set forth in this rule.

1. Memorandum of Law.

No party shall file or serve a memorandum of law that exceeds twenty-five (25) pages in length, unless leave of the judge hearing the motion is obtained prior to filing. All memoranda of law shall contain a table of contents and, wherever possible, parallel citations. Memoranda of law that contain citations to decisions exclusively reported on computerized databases (e.g., Westlaw, Lexis, Juris, etc.) shall be accompanied by copies of the decisions.

When making a motion based upon a rule or statute, the moving papers must specify the rule or statute upon which the motion is predicated.

A memorandum of law is required for all motions except the following:

(A) a motion pursuant to Fed. R. Civ. P. 15 to amend or supplement a pleading;

(B) a motion pursuant to Fed. R. Civ. P. 12(e) for a more definite statement;

(C) a motion pursuant to Fed. R. Civ. P. 17 to appoint next friend or guardian ad litem;

(D) a motion pursuant to Fed. R. Civ. P. 25 for substitution of parties; and

(E) a motion pursuant to Fed. R. Civ. P. 37 to compel discovery.

2. Affidavit.

An affidavit must not contain legal arguments but must contain factual and procedural background as appropriate for the motion being made.

An affidavit is required for all motions except the following:

(A) a motion pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim

upon which relief can be granted;

(B) a motion pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings; and

(C) a motion pursuant to Fed. R. Civ. P. 12(f) to strike a portion of a pleading.

3. Summary Judgment Motions.

Any motion for summary judgment shall contain a Statement of Material Facts. The Statement of Material Facts shall set forth, in numbered paragraphs, each material fact about which the moving party contends there exists no genuine issue. Each fact listed shall set forth a specific citation to the record where the fact is established. The record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions and affidavits. It does not, however, include attorney's affidavits. Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion.

The opposing party shall file a response to the Statement of Material Facts. The non-movant's response shall mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in

matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises. The non-movant's response may also set forth any additional material facts that the non-movant contends are in dispute in separately numbered paragraphs. Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party.

4. Motions to Amend or Supplement Pleadings or for Joinder or Interpleader.

An unsigned copy of the proposed amended pleading must be attached to a motion brought under Fed. R. Civ. P. 14, 15, 19-22. Except as provided by leave of Court, the proposed amended pleading must be a complete pleading, which will supersede the original pleading in all respects. No portion of the prior pleading shall be incorporated into the proposed amended pleading by reference.

The motion must set forth specifically the proposed amendments and identify the amendments in the proposed pleading, either through the submission of a red-lined version of the original pleading or other equivalent means.

Where leave to supplement a pleading is sought under Fed. R. Civ. P. 15(d), the proposed supplemental pleading must be limited to acts that occurred subsequent to the filing of the original pleading. The paragraphs in the proposed pleading must be numbered consecutively to the paragraphs contained in the pleading that is to be supplemented.

Caveat: The granting of the motion does not constitute the filing of the amended pleading. After leave is given, unless otherwise ordered, the moving party must file and serve the original signed amended pleading within ten (10) days of the Order granting the motion.

(b) Motions.

1. Dispositive Motions. (Amended January 1, 2004)

All motion papers must be filed with the Court and served upon the other parties not less than **THIRTY-ONE DAYS** prior to the return date of the motion. The Notice of Motion must state the return date which has been selected by the moving party.

Opposing papers must be filed with the Court and served upon the other parties not less than **SEVENTEEN DAYS** prior to the return date of the motion.

Reply papers must be filed with the Court and served upon the other parties not less than **ELEVEN DAYS** prior to the return date of the motion.

A surreply is not permitted.

All original motion papers, including memoranda of law and supporting affidavits, if any, shall be filed in accordance with the *Administrative Procedures for Electronic Case Filing* (General Order #22) and/or the case assignment form provided to the parties at the commencement of the litigation. The assigned judge may request that the parties provide a courtesy copy of the motion papers.

2. Non-Dispositive Motions. (Amended January 1, 2004)

Prior to making any non-dispositive motion before the assigned Magistrate Judge, the parties must make **good faith efforts among themselves to resolve or reduce all differences relating to the non-dispositive issue**. If, after conferring, the parties are unable to arrive at a mutually satisfactory resolution, the party seeking relief must then request a court conference with the assigned Magistrate Judge.

A court conference is a prerequisite to filing a non-dispositive motion before the assigned Magistrate Judge. Within the notice of motion, the moving party is required to set forth the date that the court conference with the Magistrate Judge was held regarding the issues being presented in the motion. Failure to include this information within the notice of motion may result in the rejection of the motion papers.

Actions which involve an incarcerated, pro se party are not subject to the requirement that a court conference be held prior to filing a non-dispositive motion.

Unless the Court orders otherwise, all motion papers must be filed with the

Court and served upon the other parties not less than **THIRTY-ONE DAYS** prior to the return date of the motion.

Opposing papers must be filed with the Court and served upon the other parties not less than **SEVENTEEN DAYS** prior to the return date of the motion.

Reply papers are not permitted without the Court's prior permission.

3. Failure To Timely File or Comply.

Any papers required under this Rule that are not timely filed or are otherwise not in compliance with this Rule shall not be considered unless good cause is shown. Where a properly filed motion is unopposed and the Court determines that the moving party has met its burden to demonstrate entitlement to the relief requested therein, the non-moving party's failure to file or serve any papers as required by this Rule shall be deemed as consent to the granting or denial of the motion, as the case may be, unless good cause is shown.

Any party who does not intend to oppose a motion, or a movant who does not intend to pursue a motion, shall promptly notify the Court and the other parties of

such intention. Notice should be provided at the earliest practicable date, but in any event no less than **SEVEN CALENDAR DAYS** prior to the scheduled return date of the motion, unless for good cause shown. **Failure to comply with this Rule may result in the Court imposing sanctions.**

(c) Cross-Motions. (Amended January 1, 2004)

A cross-motion may be filed and served at the time opposition papers to the original motion are filed and served (not less than **SEVENTEEN DAYS** prior to the return date of the motion). If a cross-motion is made, the cross-motion brief must be joined with the opposition brief and may not exceed twenty-five (25) pages in length, exclusive of exhibits. A separate brief in opposition to the original motion is not permissible.

The original moving party may reply in further support of the original motion and in opposition to the cross-motion with a reply/opposition brief that does not exceed twenty-five (25) pages in length, exclusive of exhibits. The reply/opposition papers must be filed with the Court and served on the other parties not less than **ELEVEN DAYS** prior to the return date of the original motion.

The cross-moving party may not reply in further support of its cross-motion without the Court's prior permission.

(d) Discovery Motions.

The following steps are required prior to making any discovery motion pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure.

1. Parties must make good faith efforts among themselves to resolve or reduce all differences relating to discovery prior to seeking court intervention.

2. The moving party must confer in detail with the opposing party concerning the discovery issues between them in a good faith effort to eliminate or reduce the area of controversy and to arrive at a mutually satisfactory resolution. Failure to do so may result in denial of a motion to compel discovery and/or imposition of sanctions.

3. If the parties' conference does not fully resolve the discovery issues, the party seeking relief must then request a court conference with the assigned Magistrate Judge. Incarcerated, pro se parties are not subject to the court conference requirement prior to filing a motion to compel discovery. The

assigned Magistrate Judge may direct the party making the request for a court conference to file an affidavit setting forth the date(s) and mode(s) of the consultation(s) with the opposing party and a letter that concisely sets forth the nature of the dispute and a specific listing of each of the items of discovery sought or opposed. Immediately following each disputed item, the party must set forth the reason why the item should be allowed or disallowed.

4. Following a request for a discovery conference, the Court may schedule a conference and advise all parties of a date and time. The discovery conference may be conducted by telephone conference call, initiated by the party making the request for the conference, by video conference, or by personal appearance, as directed by the assigned Magistrate Judge.

5. Following a discovery conference, the Court may direct the prevailing party to submit a proposed order, on notice to the other parties.

6. If a party fails or refuses to confer in good faith with the requesting party, thus requiring the request for a discovery conference, at the Court's discretion, the resisting party will be subject to the sanction of the imposition of costs, including the attorneys' fees of opposing counsel in accordance with Fed. R. Civ. P. 37.

7. A party claiming privilege with respect to a communication or other item must specifically identify the privilege and the grounds for the privilege claimed. No generalized claims of privilege may be made.

8. Any motion to compel discovery authorized by these Rules shall be filed no later than **TEN CALENDAR DAYS** after the discovery cut-off date. See L.R. 16.2.

(e) Order to Show Cause. **(Amended January 1, 2004)**

All motions brought by Order to Show Cause shall conform with the requirements set forth in L. R. 7.1(a)(1) and (2). **Immediately after filing an Order to Show Cause, the moving party must telephone the Chambers of the presiding judicial officer and inform Chambers staff that they have filed an Order to Show Cause.** Telephone numbers for all Chambers may be obtained from the Clerk's office or at the Court's webpage at "**www.nynd.uscourts.gov.**" The Court shall determine the briefing schedule and return date applicable to motions brought by Order to Show Cause.

In addition to the requirements set forth in Local Rule 7.1(a)(1) and (2), a motion brought by Order to Show Cause must include an affidavit clearly and specifically showing good and sufficient cause why the standard Notice of Motion procedure cannot be used. Reasonable advance notice of the application for an Order to Show Cause must be given to

the other parties, except in those circumstances where the movant can demonstrate, in a detailed and specific affidavit, good cause and substantial prejudice that would result from the requirement of reasonable notice.

An Order to Show Cause must contain a space for the assigned judge to set forth (a) the deadline for supporting papers to be filed and served, (b) the deadline for opposing papers to be filed and served, and (c) the date and time for the hearing.

(f) Temporary Restraining Order.

A temporary restraining order may be sought by Notice of Motion or Order to Show Cause, as appropriate. Filing procedures and requirements for supporting documents are the same as set forth in this Rule for other motions. Any application for a temporary restraining order must be served on all other parties unless otherwise permitted by Fed. R. Civ. P. 65. Motions for injunctive relief, other than those brought by Order to Show Cause, are governed by L.R. 7.1(b)(2). Motions brought by Order to Show Cause are governed by L.R. 7.1(e).

(g) Motion for Reconsideration.

Motions for reconsideration or reargument, unless otherwise governed by Fed. R. Civ. P. 60, may be filed and served no later than **TEN CALENDAR DAYS** after the entry of the challenged judgment, order, or decree. All motions for reconsideration shall conform with

the requirements set forth in L.R. 7.1(a)(1) and (2). The briefing schedule and return date applicable to motions for reconsideration shall conform to L.R. 7.1(b)(2). Motions for reconsideration or reargument will be decided on submission of the papers, without oral argument, unless the Court directs otherwise.

(h) Oral Argument.

On all motions made to a district court judge, except motions for reconsideration, the parties shall appear for oral argument on the scheduled return date of the motion. In the discretion of the district court judge, or on consideration of a request of any party, a motion returnable before a district court judge may be disposed of without oral argument. Thus, the parties should be prepared to have their motion papers serve as the sole method of argument on the motion.

On all motions made to a magistrate judge, the parties shall not appear for oral argument on the scheduled return date of the motion unless the Magistrate Judge *sua sponte* directs or grants the request of any party for oral argument.

(i) Sanctions for Vexatious or Frivolous Motions or Failure to Comply with this Rule.

A party who presents vexatious or frivolous motion papers or fails to comply with this

Rule is subject to discipline as the Court deems appropriate, including sanctions and the imposition of costs and attorneys' fees to opposing counsel.

(j) Adjournments.

Adjournment of motions is in the Court's discretion. Any party seeking an adjournment from the court must first contact the opposing party. No motion under this Rule will be adjourned more than two times unless the party seeking the adjournment has satisfied the Court that a further adjournment is necessary. In no event shall an adjournment last longer than four months. The party requesting the adjournment is responsible for renoticing the motion. Any motion not renoticed within four months from the initial adjournment will be deemed withdrawn.

CHAPTER IX

TRIAL PREPARATION

The Federal and Local Rules of the Northern District of New York cover all phases of trial preparation from the pretrial conference to the conclusion of a case. The following information is not meant to be all inclusive and you should always consult the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Northern District of New York to ascertain what the Court requires of all parties when filing suit, preparing for trial, and trying a lawsuit.

A. FINAL PRETRIAL CONFERENCE AND ORDER.

Prior to the actual trial, a pretrial conference is usually held between a judicial officer and a party (or his/her counsel) to determine (1) what exhibits and witnesses each side might use during the trial; (2) the approximate length of time that will be necessary for the trial and (3) the "ground rules" the Court will utilize before, during and after the trial. After this conference, an order is usually prepared which sets out the above. *See* Attachment 4 to Appendix A of the Local Rules.

B. THE TRIAL -- THE ROLE OF THE JUDGE AND JURY.

A trial is defined as "a judicial examination of issues between parties to an action." If your case proceeds to trial, the parties will each get the opportunity to present their side of the case, and the judge and jury (if the trial is a jury trial) are

responsible for entering a verdict and judgment based on the evidence and arguments presented. It is the judge's duty to see that only proper evidence and arguments are presented. In a jury trial, he/she also instructs the jury, which will be called upon at the conclusion of a jury trial to make decisions regarding factual matters in dispute. A judgment will then be entered based on the verdict reached by the jury. L.R. 58.1.

If the parties have not requested a trial by jury, L.R. 38.1, the judge becomes the trier of both the law and fact. The judge then enters a "Findings of Fact" and "Conclusions of Law," sometimes in writing, based on the evidence and arguments presented. A judgment is then entered based on those findings of fact and conclusions of law.

C. SELECTION OF THE JURY.

A jury trial begins with the judge choosing prospective jurors to be called for voir dire (examination). *See* L.R. 47.1 and General Order No. 24. The Court will determine the number of jurors, which is currently at least six (6) and no more than twelve (12). L.R. 48.1.

Peremptory challenges: Each party will be given a number of peremptory challenges established by law which enables the parties to reject (in most cases) prospective jurors without cause. This decision is based on subjective considerations of the parties when they feel a prospective juror would be detrimental

to their side of the case.

Challenge for Cause: The plaintiff or defendant may also challenge a prospective juror "for cause" when the prospective juror lacks a qualification required by law, is not impartial, is related to either of the parties or will not accept the law as given to him/her by the Court.

D. OPENING STATEMENTS.

After the jury is sworn in or "empaneled," each side may present an opening statement. The plaintiff has the burden of proving that he/she was wronged and suffered damages from such wrong and that the defendant caused such damages. The plaintiff is allowed to present the opening statement first. This may be followed by a statement by the defendant. The Court will determine the time to be allotted for opening and closing arguments. *See* L.R. 39.1.

E. TESTIMONY OF WITNESSES.

After opening statements are given, testimony of witnesses and documents are presented to the jury or the Court. The plaintiff presents his/her case first. After the initial examination of a witness (also known as "direct examination"), cross-examination is conducted by the other side. After a party has cross-examined a witness, the opposing side has the opportunity to "redirect" examination in order to re-question the witness on the points covered by the cross-examination.

If a witness testifies as to one fact, and a statement or document in the files contradicts such testimony, the document can then be used to question the witness on the accuracy of the witness' statements. If the evidence produced shows that the testimony of the witness is false, the witness is considered "impeached" by the cross-examination.

F. MOTIONS DURING THE COURSE OF THE TRIAL.

Before the closing arguments and up until the time the case is sent to the jury for deliberation, the following motions may be made.

(1) Motion in Limine: This motion is typically made prior to the jury selection. It requests that the judge not allow certain facts to be admitted into evidence, for example, insurance policies, subsequent marriages, criminal records or other matters which are either not relevant to the particular case or which might unfairly influence the jury. Either party may file a motion in limine.

(2) Motion for Judgment as a Matter of Law: This motion is usually made by the defendant at the close of evidence presented by the plaintiff. It is based on the premise that the plaintiff has failed to prove his/her case. If this motion is granted, the trial is concluded in the movant’s favor. If the Court denies the motion, the trial continues with presentation of the defendant's side.

(3) Motion for Mistrial: Either party can move for a mistrial if, for example,

during the course of the trial certain matters which are not admissible (such as those granted in an order on a motion in limine) are presented by any witness either purposely or unintentionally in the presence of the jury. If the judge grants the motion for mistrial, the trial is immediately ended and the jury is dismissed.

(4) Objections: During the examination of a witness, one side may "object" to the questioning or testimony of a witness, or presentation of evidence, if the litigant believes that the testimony or evidence about to be given should be excluded. If the objection is *sustained* by the judge, that particular testimony or evidence is excluded. If the objection is *overruled* by the judge, the testimony or evidence may be given despite the objection.

G. REBUTTAL TESTIMONY.

After each side has presented its evidence, the plaintiff may be allowed by the judge to present some rebuttal testimony.

H. CLOSING ARGUMENTS.

Closing arguments to the jury set out the facts that each side has presented and the reasons why the party believes the jury should find in favor of one side instead of the other. Time limits are sometimes set by the Court for closing arguments, and each side must adhere to the specified time. *See* L.R. 39.1.

I. CHARGE TO THE JURY.

After each side presents testimony and evidence, the judge delivers the "charge" to the jury, usually in the form of written instructions. Each side may present proposed written instructions to the judge for consideration. After the judge has considered all proposed instructions, the jury is given appropriate instructions which set forth the jury's responsibility to decide the facts in light of the applicable rules of law. The jury then returns a verdict in favor of either the plaintiff or the defendant and assesses damages to be awarded, if any.

J. MISTRIAL.

If a jury is unable to reach a verdict and the judge declares a mistrial, the case must be tried again before a new jury. A jury which cannot reach a verdict is usually referred to as a "hung jury."

K. PREPARATION OF JUDGMENT.

Following the entry of the jury's verdict, judgment in favor of the prevailing party is entered forthwith by the Clerk. These post-trial motions usually set out why a party believes the jury's verdict should be disregarded.

L. COSTS.

If costs are awarded to the prevailing party, it is necessary to prepare a bill of costs incurred in the suit for the approval of the Court. *See* L.R. 54.1. Within thirty

(30) days after entry of a judgment, the prevailing party may serve and file a "cost bill" requesting "taxation" of costs itemized thereon.

Unless otherwise provided for by statute, claims for attorney's fees must be made by motion filed no later than fourteen (14) days after entry of judgment. *See* Fed.R.Civ.P. 54(d)(2).

M. SATISFACTION OF JUDGMENT.

Satisfaction of a money judgment will be entered by the Clerk's office upon the specific conditions set forth in L.R. 58.2.

N. POST-TRIAL MOTIONS; APPEALS.

If you are unhappy with the ultimate disposition of your action, you may choose to file post-trial motions relating to your case. Additionally, you may choose to appeal the outcome of your lawsuit to the Second Circuit. You should consult the Federal Rules of Civil and/or Appellate Procedure regarding the deadlines which exist as to the above.